SERVED: April 29, 2005

NTSB Order No. EA-5154

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 26th day of April, 2005

MARION C. BLAKEY, Administrator, Federal Aviation Administration, Complainant, v. DAVID L. CURTIS, Respondent.	)	Docket SE-16987

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued on March 17, 2004, following an evidentiary hearing.[1] The law judge affirmed an order of the Administrator, finding that respondent had violated 14 C.F.R. 91.9(a) and 91.13(a) of the Federal Aviation Regulations.[2] We deny the appeal.

[1] The initial decision, an excerpt from the transcript, is attached.

[2] Section 91.9(a) prohibits operating an aircraft without
(continued…)

Respondent was the pilot-in-command and flight instructor of a Cessna 172 on an instrument flight rules (IFR) instructional flight on February 9, 2003, between Boeing Field, Seattle, and Payne Field, Everett, Washington. Respondent's student and the owner of the aircraft, Paul Maritz, obtained a computerized weather report before the flight that showed overcast skies and a temperature at Payne Field at 1 P.M. of 2 degrees Celsius. Immediately before the flight he received a weather briefing from air traffic control (ATC) indicating cloud tops at Payne Field at 2100 feet.

They left Boeing Field at approximately 2:30 P.M. Their intention was to fly to Payne Field under IFR and have Mr. Maritz execute missed approaches there. Mr. Maritz was the flying pilot and respondent handled the radio. Both wore headphones and could hear all radio communications with ATC in that sector. The parties agree that a missed approach was performed, after which respondent noticed ice on the wings. They returned for a landing, upon which control of the aircraft was lost and it ran off the runway and was substantially damaged.

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(continued…)
complying with the operating limitations specified in the approved flight manual, markings and placards. The parties agreed that the approved flight manual prohibited operations into known icing conditions and that the aircraft was placarded against such operations. Section 91.13(a) prohibits careless and reckless operations so as to endanger the life or property of another. This latter charge is derivative of the operating violation and need not be specifically proven. See Administrator v. Pritchett, NTSB Order No. EA-3271 (1991) at n.17, and cases cited there.

The Administrator offered a number of bases to support her complaint. First, she introduced evidence to show that respondent ignored two pilot reports ("pireps") to the sector controller, audible on his radio, of rime icing.[3] Second, her expert witness testified that respondent should never have undertaken this flight, but should have known from the weather report and briefing that he would have to descend and ascend into clouds at Payne Field to perform missed approaches and that the weather was such that icing was possible.[4] Third, the Administrator introduced testimony by Mr. Maritz that respondent actually pointed out ice on the wing to Mr. Maritz and then proceeded to perform the missed approach rather than taking remedial action either by landing immediately or by flying above the clouds to an airport where they could land under VFR[5] and free of the danger of ice buildup.

Respondent testified that he did not recall showing Mr. Maritz ice on the aircraft before the missed approach, nor did he recall hearing either of the two icing pireps. He claims that his actions were reasonable and that as soon as he saw ice on the aircraft (after the missed approach) he took the prudent action

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[3] The transcript erroneously refers to this as "rind" icing.

[4] There was no disagreement on the record that icing could result with a combination of precipitation in the clouds and temperatures between 2 and −10 degrees Celsius, and that for every 1,000 feet increase in altitude, the temperature drops approximately 2 degrees. Respondent's flight path took him as high as 4,000 feet, at which point he was above the clouds.

[5] Visual Flight Rules.

of landing as soon as possible.

The law judge found the testimony of Mr. Maritz more credible than that of respondent. He further found that respondent heard or should have heard the two pireps and should have taken cautionary action. The law judge specifically found that respondent should have discerned that one of these aircraft[6] was in the vicinity of Payne Field. The law judge also specifically found that respondent should have known from the weather forecasts that there was a reasonable possibility he would encounter icing.

There was more than sufficient probative evidence presented by the Administrator to sustain the charges. The testimony of Mr. Maritz, standing alone, would have been sufficient to meet the Administrator's burden of proof.

According to Mr. Maritz, respondent pointed out to him ice forming on the wing of the aircraft but nevertheless had Mr. Maritz proceed to perform a missed approach rather than land. Respondent's reasons for challenging Mr. Maritz's testimony are not convincing. How well Mr. Maritz could see was an issue squarely before the law judge and he resolved it in the Administrator's favor. We will not overturn it. Administrator v. Bargen, 5 NTSB 757, 760 (1985); Administrator v. Schmidt, et

[6] ATC advised that this aircraft could not be given a requested altitude of 4,000 feet because another aircraft was already there. The law judge concluded that respondent's was the aircraft at 4,000 feet and respondent should have known it. For the reasons discussed infra, we need not address respondent's challenge to this finding.

al., NTSB Order No. EA-4025 (1994); and Administrator v. Smith, 5 NTSB 1560, 1563 (1987), and cases cited there (resolution of credibility issues, unless made in an arbitrary or capricious manner, is within the exclusive province of the law judge). We reject respondent's argument that eyewitness testimony of ice buildup on the aircraft is not relevant because it, "does not relate to conditions on the intended path of flight." Appeal Brief at 22. We do not see how there could be any more relevant evidence.[7]

We also reject respondent's claims that case law defining "known icing conditions" does not and should not extend to the type of evidence presented here. Respondent specifically argues that the pireps, even if he had heard them (which he claims he did not), were not stated as within respondent's flight path and, thus, he was not obliged to take them into account.[8] We disagree. It would have been prudent, at a minimum, to query ATC when a report of icing in his sector was broadcast so that he could assess the threat. He failed to do so. Absent clarification that the icing was not a threat to his aircraft, he risked flying into known icing conditions.

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[7] We reject respondent's claims that the law judge was biased against him. His procedural rulings were not arbitrary or capricious and were within his discretion to run the hearing with reasonable dispatch and efficiency.

[8] Respondent was responsible for radio communications. As such, he was charged with monitoring what was being said and taking it into account in the flight. He has offered no excuse for his claimed failure to hear the pireps.

While not necessary to our decision, we also note our disagreement with respondent's more general criticisms regarding the law judge's interpretation of "operating into known icing conditions." Respondent believes that the Administrator's evidence was too theoretical and did not represent the type of actual risk that the rules should address. We disagree with these arguments as well. Pilots are required to obtain all information pertinent to their flight – that is, be well prepared – and make reasoned decisions based on that information. Here, respondent knew that he would be flying into clouds that contained moisture, knew that the temperature on the ground at his destination was close to freezing, and knew that in the cloudy skies on the way to and above Payne Field the temperature would be colder. The risk of icing was clear. Respondent nevertheless chose to make the flight, and to continue it when further evidence of actual icing or reported icing presented itself, all with predicable consequences. In our view, doing so was clear error, in violation of the cited regulations and especially egregious in the case of a flight instructor. We also consider respondent's choice to land at Payne Field the product of incomplete decision making. There is no evidence that respondent even considered options other than landing where icing was a proven risk, such as attempting to locate a VFR airport within flying range, as another aircraft in the vicinity had done.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The 90-day suspension of respondent's certificate shall begin 30 days after the service date indicated on this opinion and order.[9]

ROSENKER, Acting Chairman, and ENGLEMAN CONNERS, HEALING, and HERSMAN, Members of the Board, concurred in the above opinion and order.

[9] For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. 61.19(g).